ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR

THE CAYUGA NATION by its COUNCIL OF CHIEFS and CLAN MOTHERS,	)
Appellants,	)
v.	)
EASTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,	)
Appellee	)

Decision

In the summer and early fall of 2016, the Bureau of Indian Affairs (BIA) provided the Cayuga Nation (Nation) with technical assistance for a "Statement of Support" initiative (the Initiative). The Initiative sought to resolve a longstanding leadership dispute between two factions: the "Jacobs Council" and the "Halftown Council."[1] Spearheaded by the Halftown Council, citizens of the Nation received a document describing the traditional Cayuga leadership selection and removal process, as well as a list of the Halftown Council members. They were then asked whether they agreed that the governance process as described in the mailer accurately expressed Cayuga law, and whether they supported or rejected the listed Halftown Council members as the Nation's proper leadership. Just over 60 percent of Initiative respondents voiced their support on both points.

While the Initiative process was underway, the BIA Eastern Regional Director Bruce Maytubby (Regional Director) received competing Indian Self-Determination and Education Assistance Act (ISDA) 638 proposals from both the Jacobs and Halftown Councils. After receiving the results of the Initiative, but before making a decision on either Council's 638 proposal, the Regional Director sought briefing from both groups in November 2016 concerning (1) the validity of the Initiative under Cayuga law, which the Jacobs Council had disputed from the outset; and (2) whether, and despite the results of the Initiative, the Jacobs Council was vested with governing authority under traditional Cayuga law. In December 2016, the Regional

[1] This appeal was filed in the name of Appellants "The Cayuga Nation by its Council of Chiefs and Clan Mothers," who claim that the Nation's Council properly consists of William Jacobs, Karl Hill, Martin Lay, Samuel George, Alan George, and Tyler Seneca. For the purposes of this Decision, I will refer to Appellants as either "Appellants" or "the Jacobs Council." The Interested Parties in this case, who the Regional Director below determined is the duly-recognized Council, style themselves as the "Cayuga Nation" and claim that the Nation's Council properly consists of Clint Halftown, Gary Wheeler, Mike Barringer, Tim Twoguns, and Donald Jimerson. For the purposes of this Decision, I will refer to the Interested Parties as either "Interested Parties" or "the Halftown Council." In addition, when citing the Record, I will refer to signatories and titles as set forth in the documents themselves. Except as specifically stated in this Decision, no such reference should be read as an endorsement of any individual or entity's legal authority to claim a given title or role.

Director concluded that the Initiative was legitimate both as a matter of Cayuga law and as conducted in practice, awarded a 638 contract to the Halftown Council as the Nation's proper governing body, and returned as unauthorized the contract proposed by the Jacobs Council.[2] This appeal followed.

Appellants allege that (1) the Vacancies Reform Act prohibits me from adjudicating this dispute; (2) the Initiative violated Cayuga law and infringed on the Nation's right to self-governance; (3) the Regional Director's conduct during the Initiative violated Appellants' due process rights; and (4) the Decision was arbitrary and capricious within the meaning of the Administrative Procedure Act.[3]

As a threshold matter, I find that I have properly assumed jurisdiction over this appeal. On the merits, I find that the Regional Director's reliance on the results of the Initiative was not arbitrary and capricious and was supported by substantial evidence. I also find that BIA's provision of technical assistance to the Halftown Council did not violate due process. I therefore affirm the Regional Director's Decision to recognize the Halftown Council as the legitimate Cayuga Nation government and to reject Appellants' 638 proposal as unauthorized.

I. Factual Background.

The history of this dispute is discussed extensively in two Interior Board of Indian Appeals (IBIA) decisions: *Samuel George et al. v. Eastern Regional Director*[4] and *Cayuga Indian Nation v. Eastern Regional Director*.[5] In short, the Nation's leadership split into factions in 2004, sparking civic unrest and over a decade of litigation concerning who had the authority to speak for the Nation and with whom the United States could entreat in furtherance of its government-to-government relationship with the Nation.

The current iteration of the dispute stems from the February 20, 2015 decision of then-Acting Eastern Regional Director Tammie Poitra (Acting Regional Director) concerning Cayuga leadership for the purposes of 638 contracting.[6] As is the case here, the Acting Regional Director received competing Cayuga 638 proposals: the first from a six-member Council led by Clint Halftown that had acted as the Nation's last acknowledged governing Council in 2006, and the second from a group of Nation members that largely overlaps with the current Appellants.[7]

The Acting Regional Director determined that BIA would recognize the Nation's 2006 Council for the purposes of 638 contracting, as it had been the last Nation's last undisputed

---

[2] *See generally* Letter from Bruce Maytubby, E. Reg'l Dir., U.S. Bureau of Indian Affairs, to Mr. Clint Halftown, Cayuga Nation Council, and Mr. William Jacobs, Cayuga Nation Council (Dec. 15, 2016) (AR-Tabs 1-2 00002) [hereinafter "Decision"].
[3] *See generally* Appellants' Opening Brief, The Cayuga Nation by its Council of Chiefs and Clan Mothers v. E. Reg'l Dir., Bureau of Indian Affairs (Mar. 30, 2017) [hereinafter "Appellants' Brief"].
[4] 49 IBIA 164 (2009).
[5] 58 IBIA 171 (2014).
[6] *See generally* Letter from Tammie Poitra, Acting E. Reg'l. Dir., U.S. Bureau of Indian Affairs, to the Cayuga Nation *et al.* (Feb. 20, 2015) (AR – Appendix B 00341 a) [hereinafter "Interim Decision"].
[7] *Id.* at 2 (AR – Appendix B 00341 b).

leadership group.[8] But the Acting Regional Director underscored that this was merely an interim decision, and urged the Nation to establish a mutually-agreed upon Council.[9] The Acting Regional Director also clarified that she was neither making a decision on the merits of either faction's arguments nor interpreting Cayuga law, though she warned the Nation that BIA could ultimately be forced to do so if the dispute was not resolved internally.[10] Finally, the Acting Regional Director rejected a request to independently confirm a precursor version of the Initiative, claiming that BIA was "aware of no applicable authority that provides for verification of election results or allows BIA to provide any independent confirmation of results of a 'Campaign of Support' under these circumstances."[11] The Acting Regional Director instead urged the Nation to come to a common internal understanding over what role, if any, a campaign of support should play in the selection or retention of its leadership.[12]

Although the Interim Decision was "intended to provide additional time to the members of the Nation to resolve this dispute using tribal mechanisms,"[13] on June 14, 2016, the Regional Director received a letter from the Halftown Council reporting that the situation had actually worsened after one leadership faction had splintered into several sub-factions.[14] The Halftown Council chronicled a list of urgent consequences stemming from the ongoing dispute – suspension of Cayuga land into trust applications, suspension of tribal gaming activities, a breakdown in local law enforcement, the Nation's inability to obtain Federal grant funding, etc.[15]

In recognition of the fact that the Nation is "a traditional government that relies on an oral and unwritten governance process that has been in place since time immemorial,"[16] the Halftown Council suggested a non-electoral solution of having Nation citizens "memorialize, in writing, their understanding of Nation law and traditions regarding certain Nation governance matters."[17] They proposed a Statement of Support process, which would ask each adult citizen's views on:

- "A governance document that describes the operation of the government of the Cayuga Nation of New York and the selection and removal process for its leaders"; and

- "Whether five named individuals from the Turtle, Heron, Bear, and Wolf Clans who were selected through a traditional clan process are the recognized members of the Cayuga Nation Council."[18]

---

[8] *Id.* When the BIA must deal with a tribe for government-to-government purposes amidst an unresolved tribal leadership dispute, the BIA may recognize the last undisputed tribal leader on an interim basis. *See, e.g., Rosales v. Sacramento Area Dir.*, 32 IBIA 158, 167 (1998).
[9] Interim Decision at 2, 6-7 (AR – Appendix B 00341 b, 00341-42 f-g).
[10] *Id.*
[11] *Id.* at 8 (AR – Appendix B 00341 h).
[12] *Id.*
[13] *Id.* at 7 (AR – Appendix B 00341 g).
[14] Letter from Clint Halftown, Heron Clan Representative and Fed. Representative, Cayuga Nation *et al.*, to Michael Smith, Deputy Bureau Dir., U.S. Bureau of Indian Affairs *et al.*, at 3 (AR-Appendix A 00187) [hereinafter "Initiative Request"].
[15] *Id.* at 3-4 (AR-Appendix A 00187-88).
[16] *Id.* at 5 (AR-Appendix A 00189).
[17] *Id.*
[18] *Id.*

The Initiative Request also included a brief legal analysis as to its permissibility under Cayuga law, proposed Initiative procedures, a request that BIA verify the results of the Initiative, and a request that if both proposals received a majority approval, BIA recognize the five named individuals (who comprised the Halftown Council) as the Nation's valid leadership.[19]

On June 17, 2016, the Regional Director sent a letter to Ms. Anita Thompson, the Secretary of the Cayuga Nation Council and an affiliate of the Jacobs Council.[20] The Regional Director informed Ms. Thompson that she would soon be receiving a Statement of Support proposal from the Halftown Council and briefly described the proposed process.[21] The Regional Director stated that BIA "agreed that under the current circumstances a 'Statement of Support' process would be a viable way of involving the Cayuga people in a determination of the form and membership of their tribal government."[22] The Regional Director urged the Jacobs Council to consult with the Halftown Council concerning how to best design the Initiative, and to provide the Halftown Council with feedback on the Initiative and the proposed Statement of Support documents.[23] The Regional Director also specifically invited proposals from the Jacobs Council for any potential alternatives to the Initiative, and offered to assist the Jacobs Council in resolving any other concerns with the process.[24]

On July 1, 2016, the Jacobs Council, through counsel, sent a letter to the Regional Director strenuously objecting to the proposed Initiative.[25] The Jacobs Council argued that the Initiative was inconsistent with traditional Cayuga law and customs, as well as with previous BIA determinations.[26] The Jacobs Council requested in-person meetings with then-Deputy Bureau Director Michael Smith as well as the Regional Director prior to BIA making any further decisions on the matter.[27] The Jacobs Council does not appear to have contacted the Halftown Council directly concerning any aspect of the Initiative.[28]

On July 6, 2016, the Halftown Council transmitted a cover letter and four attachments to the citizens of the Nation: (1) a summary of the Initiative; (2) a document setting out a "governance and leadership selection process"; (3) a statement of support for the governance and leadership selection process document; and (4) a statement of support for the five individuals

---

[19] *Id.* at 6-8 (AR-Appendix A 00190-92).

[20] Letter of Bruce Maytubby, Reg'l Dir., U.S. Bureau of Indian Affairs, to Anita Thompson, Sec., Cayuga Nation, at 1 (June 17, 2016) (AR-Appendix A 00201) [hereinafter "June Letter"].

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Letter from Joseph J. Heath to Bruce Maytubby, E. Reg'l Dir., U.S. Bureau of Indian Affairs, *et al.* (July 1, 2016) (AR-Appendix AR 00203) [hereinafter "First Heath Letter"].

[26] *Id.* at 2 (AR-Appendix A 00204).

[27] *Id.*

[28] On July 5, 2016, the Halftown Council, through counsel, sent a letter to the Jacobs Council's attorney responding to the First Heath Letter. Letter from Niels Holch to Joseph J. Heath, Esq. (July 5, 2016) (AR-Appendix A 00284). Halftown counsel explained the Halftown Council's position and invited the Jacobs Council to collaborate with the Halftown Council on the Initiative. *See generally id.* There is no evidence on the Record concerning any response from the Jacobs Council.

who made up the Halftown Council.[29] The cover letter directed that, if the recipient agreed with the governance document and supported the Halftown Council, the recipient should "sign this Statement in the presence of a witness and return the Statement back to us in the enclosed envelope."[30]

On July 8, 2016, the Jacobs Council, through counsel, wrote a letter to the Regional Director again objecting to the use of an Initiative process and urging BIA to reject the Initiative.[31] On July 25, 2016, the Jacobs Council transmitted a letter to the citizens of the Nation arguing that the Initiative was inconsistent with Cayuga law and requesting that citizens respond to the Halftown Council with mailers stating "WE REJECT THIS PROCESS OF VOTING BY MAIL, AND SUPPORT THE CAYUGA NATION'S TRADITIONAL SYSTEM OF CONSENSUS DECISION MAKING BY THE CHIEFS AND CLAN MOTHERS."[32]

During July and August, 2016, Cayuga citizens mailed in statements of support to the post office box that the Halftown Council maintained for the purposes of the Initiative.[33] Pursuant to the Halftown Council's request for technical assistance,[34] from September 7-9, 2016, staff from the BIA's Eastern Regional Office visited the Halftown Council's offices to conduct an initial review of the returned statements of support.[35] On September 21, 2016, representatives of the Halftown Council visited the Eastern Regional Office in Nashville, Tennessee.[36] The BIA employees scrutinized the statements of support and the membership roll maintained by the Nation's Secretary and concluded that, of 392 adult Cayuga citizens identified on the membership roll, 237 submitted statements of support for both of the two propositions.[37] At some point in the interim, BIA met with Jacobs Council representatives in Washington, D.C. to discuss their concerns with and objections to the Initiative.[38] Finally, on October 6, 2016, the Halftown Council sent letters to both the Regional Director and the citizens of the Nation

---

[29] *See generally* Letter from the Cayuga Nation to Cayuga Nation Citizens (July 6, 2016) (AR-Appendix A 00274).
[30] *Id.* at 2 (AR-Appendix A 00275).
[31] Letter from Joseph J. Heath to Bruce Maytubby, Reg'l Dir., U.S. Bureau of Indian Affairs (July 8, 2016) (AR-Appendix A 00286) [hereinafter "Second Heath Letter"].
[32] Letter from the Cayuga Nation Council to Cayuga Nation Citizens (July 25, 2016) (AR-Appendix A 00288) [hereinafter "Jacobs July Letter"] (emphasis in original).
[33] Decision at 5 (AR Tabs 1-2 0006).
[34] Letter from the Cayuga Nation to Michael Smith, Deputy Bureau Dir., U.S. Bureau of Indian Affairs, *et al.* (Aug. 2, 2016) (AR-Appendix A 00289).
[35] Decision at 5 (AR Tabs 1-2 0006).
[36] *Id.*
[37] *Id.* Additional statements of support were submitted, but were rejected for various reasons. *Id.*; *see also* U.S. Bureau of Indian Affairs, Cayuga Nation Review of Docs. in Support of Fed. Representatives (Sept. 21, 2016) (AR-Appendix A 00309).
[38] Appellees claim that on September 28, 2016, the BIA met with Jacobs Council representatives in Washington, D.C. to discuss their concerns with and objections to the Initiative. Appellee's Response Brief, The Cayuga Nation by its Council of Chiefs and Clan Mothers v. E. Reg'l Dir., Bureau of Indian Affairs at 5 (May 2, 2017) [hereinafter "Appellee Brief"]. Appellants dispute this statement and claim that the meeting took place at some point in July 2016. Appellants' Reply Brief, The Cayuga Nation by its Council of Chiefs and Clan Mothers v. E. Reg'l Dir., Bureau of Indian Affairs at 6, 6 n.5 (May 15, 2017) [hereinafter "Appellants' Reply"]. In any case, the parties appear to agree that at least one in-person meeting between the Jacobs Council and the BIA occurred prior to the Regional Director requesting briefing on the Initiative.

announcing the result of the Initiative process, and requested that the Regional Director certify the Halftown Council as the Nation's legitimate governing body.[39]

In the meantime, and prior to BIA's final review of the Initiative results, the Regional Director received two 638 proposals in September 2016 that were purportedly on behalf of the Nation. The first was labeled as being for a "Community Services Program," and was submitted by the "Nation Council of the Cayuga Nation of New York," comprised of Clint Halftown, Tim Twoguns, Gary Wheeler, Donald Jimerson, and Mike Barringer (the Halftown Council).[40] The second was labeled as being for a "Consolidated Tribal Government Program," and was submitted by the "Cayuga Nation Council," comprised of William C. Jacobs, Samuel George, Karl Hill, Alan George, Marin Lay, and Tyler Seneca (the Jacobs Council).[41]

On November 1, 2016, the Regional Director sent a letter to both the Halftown and Jacobs Councils noting that as the IBIA had previously held in *George*, "if BIA needs to identify a tribal representative for purposes of executing a 638 contract or otherwise conducting government-to-government business, BIA must decide whom to recognize as that tribal representative."[42] The Regional Director accordingly stated that the Councils' "competing proposals for 638 contracts require, and therefore permit, BIA to determine whether either of the proposals was submitted by a recognized 'tribal organization.'"[43] Prior to entering into a 638 contract with either Council, and "[i]n order both to accord due process and to render the best possible decision," the Regional Director requested that both Councils submit opening briefs, and optional response briefs, on the following issues:

- The validity of the Initiative as a matter of Cayuga law;
- Concerns about how the statement of support process had been conducted on the ground; and
- The validity of the Jacobs Council's claim that it was vested with tribal government authority via traditional tribal processes.[44]

---

[39] Letter from the Cayuga Nation to Michael Smith, Deputy Bureau Dir., U.S. Bureau of Indian Affairs, *et al.* (Oct. 6, 2016) (AR-Appendix A 00310); Letter from the Cayuga Nation Council to Cayuga Nation Citizens (Oct. 6, 2016) (AR-Appendix A 00331).

[40] Cayuga Nation: Submission of Three Year 638 Program Proposal for 2016-2018 (Sept. 15, 2016) (AR-Appendix B 00303).

[41] Cayuga Nation, Consolidated Tribal Government Program Proposal (Sept. 30, 2016) (AR-Appendix A 00336).

[42] Letter of Bruce Maytubby, E, Reg'l Dir., U.S. Bureau of Indian Affairs, to Clint Halftown, Cayuga Nation Council, and William Jacobs, Cayuga Nation Council at 1 (Nov. 1, 2016) (AR-Appendix A 00340) [hereinafter "Scheduling Order"].

[43] *Id.* (citing *Laroque v. Aberdeen Area Dir.*, 29 IBIA 201 (1996)).

[44] *Id.* at 1-2 (AR-Appendix A 00340-41).

Both the Halftown Council and the Jacobs Council submitted opening briefs to the Regional Director on November 14, 2016[45] and response briefs on November 29, 2016.[46]

After reviewing the briefs, the Regional Director issued the Decision on December 15, 2016. In relevant part, the Regional Director found that:

- The Nation's failure to remedy its leadership dispute in the nearly two years following the Interim Decision, as well as the lack of overlap between the Nation's 2006 last undisputed government and either the Halftown Council or the Jacobs Council, necessitated BIA determination as to which Cayuga council submitted a valid ISDA proposal as a matter of law.[47]

- The Initiative was consistent with the Haudenosaunee Great Law of Peace, upon which Cayuga traditional law is founded. As such, the United States must defer to the right of Nation citizens to determine their own governing structure.[48]

- The Halftown Council used a legitimate membership roll to tally Initiative responses.[49]

- The results of the Initiative were not voided by biased language in the Statement of Support documents or improper "vote purchasing" from the Halftown Council.[50]

- In light of the Nation's inability to internally resolve its dispute and the Jacobs Council's advance notice and right to participate in the Initiative, the Acting Regional Director's rejection of a Statement of Support campaign in the Interim Decision did not preclude the BIA from subsequently accepting the Initiative results.[51]

The Regional Director accordingly upheld the Initiative, awarded the 638 contract to the Halftown Council, and returned the Jacobs Council's proposal as unauthorized.[52]

---

[45] *See* Letter from Niels Holch *et al.*, Counsel, Cayuga Nation Council, to Bruce Maytubby, Dir., BIA E. Region, at 13, 18 (Nov. 14, 2016) (AR-Tabs 1-2 00031) [hereinafter "Halftown Letter Brief"]; Memorandum of Law and Facts in Support of Cayuga Nation Council's Recognition as the Lawful Government of the Nation (Nov. 14, 2016) (AR-Tabs 1-2 00050) [hereinafter "Jacobs Memo"].

[46] Memorandum of Cayuga Nation Council in Response to Letter Brief of Halftown Group (Nov. 29, 2016) (AR-Tabs 1-2 00140) [hereinafter "Jacobs Response Brief"]; Letter from Niels Holch *et al.*, Counsel, Cayuga Nation Council, to Bruce Maytubby, Dir., BIA E. Region (Nov. 29, 2016) (AR-Tabs 1-2 00164) [hereinafter "Halftown Response Brief"].

[47] Decision at 3-4 (AR-Tabs 1-2 00004-5).

[48] *Id.* at 6-7, 9-10 (AR-Tabs 1-2 00007-8, 00010-11).

[49] *Id.* at 8-9 (AR-Tabs 1-2 00009-10).

[50] *Id.* at 11-13 (AR-Tabs 1-2 00012-13).

[51] *Id.* at 13-14 (AR-Tabs 1-2 00014-15).

[52] *Id.* at 14 (AR-Tabs 1-2 00015).

On January 13, 2017, Appellants submitted a Notice of Appeal of the Decision to the IBIA pursuant to 25 C.F.R. Part 900, which governs ISDA appeals.[53] Appellants requested that the IBIA vacate the Decision, vacate the Regional Director's return of the Jacobs Council's 638 proposal, direct the Regional Director to recuse himself from any further decision making regarding the Nation, and award all other relief deemed proper.[54] On January 31, 2017, I sent a letter to the IBIA informing them that I was assuming jurisdiction over the appeal pursuant to 25 C.F.R. § 2.20(c) and 43 C.F.R. § 4.332(b).[55]

II. Standard of Review.

The Assistant Secretary – Indian Affairs (AS-IA) will review decisions by Regional Directors to ensure that they comport with the law, are supported by the administrative record, and are neither arbitrary nor capricious.[56] However, issues of law and challenges to the sufficiency of the evidence are reviewed de novo.[57] Appellants bear the burden of showing that a Regional Director failed to exercise his discretion properly,[58] but the reviewing entity will not substitute its judgment for the Regional Director's.[59] Rather, the AS-IA must "ensure that [the Regional Director] addressed the arguments that were presented to him and that he considered the requisite [legal] criteria. . . ."[60] Simple disagreement with a Regional Director's reasoning or a general allegation of error is insufficient to meet an appellant's burden.[61]

III. Discussion.

Appellants raise four main arguments in this appeal. First, they argue that I lack the authority to render a final decision on behalf of the Department of the Interior (Department). Second, they argue that the Regional Director's finding that the Initiative was valid under Cayuga law violated the Nation's right of self-governance. Third, they argue that the Regional Director's conduct during the planning and execution of the Initiative violated the Jacobs

---

[53] Notice of Appeal From Decision of BIA Official, Cayuga Nation by its Council of Chiefs and Clan Mothers v. Eastern Regional Director, Bureau of Indian Affairs (Jan. 13, 2017) (AR-Tabs 3 – 11 01472) [hereinafter "Notice of Appeal"].

[54] *Id.* at 13 (AR-Tabs 3-11 01484).

[55] Letter from Michael S. Black, Acting Assistant Sec'y – Indian Affairs, to The Honorable Thomas A. Blaser, Chief Judge, Interior Board of Indian Appeals (Jan. 31, 2017) (AR-Tabs 3-11 01538). In the interim, there was briefing from both Appellants and Appellee as to whether this appeal should properly remain before the IBIA pursuant to 25 C.F.R. Part 900, which governs appeals from actions related to the ISDA, or whether it was properly before the AS-IA pursuant to 25 C.F.R. Part 2, which governs (among other things) decisions not to recognize a group as a tribal government. *See, e.g.*, Order for Additional Statements and Order Vacating Order for Briefing on Delegation of Authority, The Cayuga Nation by its Council of Chiefs and Clan Mothers v. E. Reg'l Dir., Bureau of Indian Affairs (IBIA 17-025) (Feb. 2, 2017) (AR-Tabs 3-11 01546). Ultimately, the IBIA determined that the AS-IA had jurisdiction and transferred this appeal to me. Notice of Assumption of Jurisdiction Over Tribal Governance Decision by the Assistant Secretary – Indian Affairs, The Cayuga Nation by its Council of Chiefs and Clan Mothers v. E. Reg'l Dir., Bureau of Indian Affairs (IBIA 17-025) (Mar. 10, 2017). Neither Appellants nor Appellees have appealed or otherwise objected to this transfer of jurisdiction.

[56] *O'Bryan v. Great Plains Reg'l Dir.*, 48 IBIA 109, 116 (2008).

[57] *Heirs and Successors in Interest to Mose Daniels v. E. Okla. Reg'l Dir.*, 55 IBIA 139, 143 (2012).

[58] *Id.*

[59] *Benewah County, Idaho v. Nw. Reg'l Dir.*, 55 IBIA 281, 294 (2012).

[60] *Id.*

[61] *King v. E. Okla. Reg'l Dir.*, 46 IBIA 149, 153 (2007).

Council's due process rights. Finally, they set forth several reasons why they believe that the Regional Director acted arbitrarily and capriciously in rendering the Decision.

Below, I address each argument in turn. I ultimately reject Appellants' claims and uphold the Regional Director's Decision.

1. I am properly vested with authority to hear this case.

Appellants argue that I lack the authority to issue final decisions on behalf of the Department because I do not satisfy the requirements of the Vacancies Reform Act (VRA),[62] which establishes procedures through which federal agencies may temporarily fill certain positions with acting officials.[63] Assuming *arguendo* that this argument is properly preserved on appeal,[64] it is not persuasive.

The AS-IA must be appointed by the President and confirmed by the Senate (a so-called "PAS" position).[65] With a few exceptions not relevant here, the VRA is the exclusive means for temporarily authorizing an official to perform the functions or duties of a vacant PAS position in an acting capacity.[66] The VRA states that absent any other specific statutory authority governing succession, when a PAS official "dies, resigns, or is otherwise unable to perform the functions and duties of the office," the acting official chosen to replace the duly-appointed PAS official must be either (1) the person serving as the designated "first assistant" to the PAS office; (2) a different PAS official as chosen by the President; or (3) a senior official of the agency at issue as chosen by the President.[67]

Appellants argue that I am ineligible to assume jurisdiction over this appeal because at the time I was delegated AS-IA authority, I was not first assistant to the AS-IA, I was not already

---

[62] 5 U.S.C. § 3341 *et seq.* *See* Appellants' Brief at 2 n.1.
[63] Appellants' Brief at 2 n.1.
[64] In filings before the IBIA prior to my assumption of jurisdiction, Appellants objected generally to my eventual participation in this matter, citing alleged conflicts of interest. *See* Statement and Response of Appellants to Interior Board of Indian Appeals Orders of January 23, 2017, and February 2, 2017, No. IBIA 17-025 at 9-11 (Feb. 15, 2017) (AR 01572-74). However, Appellants never specifically argued that I lacked authority under the VRA to adjudicate this appeal either before the Regional Director or the IBIA. *See id.*; *see also generally* Jacobs Memo (AR-Tabs 1-2 00050); Jacobs Response Brief (AR-Tabs 1-2 00140). There is a "well-established general rule that [the IBIA] will not consider arguments or issues raised for the first time on appeal to the Board," *Wind River Alliance v. Rocky Mountain Reg'l Dir.*, 52 IBIA 224, 227 (2010), and I similarly find that Appellants did not preserve this argument for the purposes of this appeal. In addition, Appellants raise this argument only in one footnote of each of their briefs. Appellants' Brief at 2 n.1; Appellants' Reply at 1 n.1. The United States Court of Appeals for the Second Circuit, in whose jurisdiction the Nation is located, has held that "an argument made only in a footnote [is] inadequately raised for appellate review." *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998). Nevertheless, because I conclude that this argument fails on the merits as well, I will address it. And, to whatever extent Appellants preserved their objections to my participation in this matter generally, "[a]gency officials are not disqualified from conducting a second proceeding involving a party merely because they have ruled against that party previously." *Gipson v. Veterans Admin.*, 682 F.2d 1004, 1008 (D.C. Cir. 1982) (citing *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236-37 (1947)). My tangential role in the dispute thus far does not even rise to the level of a previous negative ruling against Appellants.
[65] 43 U.S.C. §§ 1453; 1453a; 1454; Reorg. Plan of 1950 § 2, 64 Stat. 1262; 42 Fed. Reg. 53,682 (Oct. 3, 1977).
[66] 5 U.S.C. § 3347(a).
[67] 5 U.S.C. § 3345(a).

serving in a PAS position, and the President had not asked me to serve in that capacity.[68] That is incorrect. Following the expiration of the relevant time period for an acting PAS, or (as here) in the absence of an individual who satisfies one of the three categories, the VRA requires that a vacant PAS position remain vacant and that only the head of the agency (here, the Secretary of the Interior) perform the "functions and duties" assigned to that vacant position.[69] But, recognizing the difficulties this could place on day-to-day agency operations, Congress limited the agency head's exclusive "functions or duties" to those that a statute or regulation specifically requires to be exclusively performed by the PAS official (here, the AS-IA).[70] The agency head may delegate non-exclusive PAS functions or duties to other agency officials, even those outside of the three VRA categories.[71] Accordingly, the Secretary of the Interior (Secretary) may delegate the authority to perform the AS-IA's non-exclusive functions and duties to other Interior officials, which then-Acting Secretary Jack Haugrud properly did when he redelegated me the duties of the AS-IA in Amended Order No. 3345,[72] a delegation which current Secretary Ryan Zinke has since extended.[73]

The question, then, is whether the authority to adjudicate appeals from the actions of BIA officials[74] is a function or duty assigned by statute or regulation exclusively to the AS-IA such that it cannot be delegated to a non-AS-IA official. It is not.[75] 25 C.F.R. Part 2 allows officials other than the AS-IA to decide appeals,[76] vests the AS-IA with discretionary authority to decline jurisdiction over an appeal,[77] and permits subordinate officials to issue the decision once the AS-IA does assume an appeal.[78] Federal regulations further authorize the Secretary to take jurisdiction over any case before any Interior employee, at any stage of the adjudication, and to issue a final agency decision.[79] Finally, in 2005, the Solicitor of the Department issued a memorandum identifying only three functions or duties of the AS-IA that, by law, could not be delegated, none of which are relevant here.[80]

---

[68] Appellants' Brief at 2 n.1.
[69] *See* 5 U.S.C. § 3348.
[70] *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 420 (D. Conn. 2008) (citing 5 U.S.C. § 3348(a)(2)), *aff'd*, 587 F.3d 132 (2d Cir. 2009) (per curiam).
[71] *Id. See also* U.S. Dep't of Justice, Office of Legal Counsel, *Guidance on Application of Federal Vacancies Reform Act of 1998* (Mar. 22, 1990), Question 48 (most responsibilities performed by a PAS officer will not be exclusive and FVRA permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency).
[72] Acting Secretary Haugrud was directed to perform the duties of the office of the Secretary of the Interior, effective January 20, 2017, by Presidential Memorandum. *See* Memorandum for Kevin Jack Haugrud, Deputy Solicitor – Mineral Resources (Jan. 17, 2017).
[73] Secretary Zinke's amended Order provides that unless the AS-IA position is otherwise filled pursuant to applicable law, my delegated authority expires on July 31, 2017. Secretary of the Interior, Order No. 3345, Amendment No. 5 (May 19, 2017).
[74] 25 C.F.R. § 2.6(c) (decisions made by the AS-IA shall be final for the Department and effective immediately unless the AS-IA provides otherwise).
[75] R.S. §§ 463, 465, now codified as 25 U.S.C. §§ 2 and 9, respectively, and 5 U.S.C. § 301. *Compare* 25 U.S.C. § 2103(d) (authority to disapprove certain mineral agreements may "only be delegated" to AS-IA).
[76] *See, e.g.*, 25 C.F.R. § 2.4 (officials who "may" decide appeals).
[77] 25 C.F.R. § 2.20(c).
[78] *Id.*
[79] 43 C.F.R. § 4.5(a)(1).
[80] *See* Office of the Solicitor, Mem. Re: Redelegation of Duties of the Assistant Secretary-Indian Affairs (Jan. 28, 2005); *see also Schaghticoke Tribal Nation*, 587 F. Supp. 2d at 420-21 (citing Solicitor Memorandum approvingly in rejecting VRA challenge to acting agency official).

In their Reply, Appellants argue that while 25 C.F.R. Part 2 "may allow the ASIA to 'assign responsibility to issue a decision in the [IBIA] appeal to a Deputy to the Assistant Secretary;' however, that decision is one that is exclusive to the ASIA herself."[81] I believe Appellants are suggesting that even if the AS-IA delegates decision making authority over an appeal to the Deputy, the fact that the Deputy is within the AS-IA office means that that authority remains "exclusive" to the AS-IA for the purposes of the VRA. That is incorrect: for example federal regulations vest, the Secretary, who is unquestionably not "within" the AS-IA office, the authority to assume jurisdiction over any appeal before the AS-IA. Similarly, the AS-IA's jurisdiction over these appeals is discretionary, with decision making authority otherwise vested in the IBIA. Decisions on appeal from a Regional Director thus by definition cannot be "exclusive" to the AS-IA within the meaning of the VRA.

Because the AS-IA's functions and duties under 25 C.F.R. Part 2 are non-exclusive, I have jurisdiction to render a decision in this appeal pursuant to the Secretary's delegation of authority.

2. The Regional Director did not violate the Nation's right of self-governance.

i. The Regional Director had the authority to examine whether the Initiative complied with Cayuga law.

It is a "bedrock principle of federal Indian law that every tribe is 'capable of managing its own affairs and governing itself,'"[82] and as such is "well established that a tribe has the primary authority to interpret its own constitution and that BIA must defer to a reasonable interpretation put forth by the tribe."[83] Federal deference is due to such a tribal interpretation regardless of whether the tribe has a formal judiciary or resolves disputes by other means.[84] Relatedly, it is a foundational tenet of Federal Indian law that the Federal Government should encourage and defer to tribal resolutions of internal disputes.[85] As the United States Court of Appeals for the Eighth Circuit has noted:

> While the BIA may at times be obliged to recognize one side in a dispute as part of its responsibility for carrying on government relations with the Tribe, such recognition is made only on an interim basis. Once the dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself.[86]

---

[81] Appellants' Reply at 1 n.1 (alteration in original).
[82] *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831)).
[83] *Paula Brady et al. v. Acting Phoenix Area Dir.*, 30 IBIA 294, 299 (1997).
[84] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978).
[85] *See, e.g., id.* at 63 (noting "a congressional purpose to protect tribal sovereignty from undue interference"); *accord Aguayo v. Jewell*, 827 F.3d 1213, 1227-28 (9th Cir. 2016) ("[W]hen it comes to matters of tribal governance and membership . . . the BIA generally maintains a hands-off approach, treading lightly to avoid unnecessary intrusion in tribal self-governance.") (citations and internal quotations omitted).
[86] *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 943 (8th Cir. 2010) (internal quotations and citations omitted); *accord Patrick Stands Over Bull et al. v. Billings Area Dir.*, 6 IBIA 98, 104

But, there are certain circumstances in which BIA must act in order to avoid "effectively creating a hiatus in tribal government which jeopardize[s] the continuation of necessary day-to-day services on the reservation."[87] This is because the:

> BIA has the authority and responsibility to identify the duly chosen or elected tribal governing body to facilitate relations between a tribe and federal agencies. Where an internal tribal dispute exists with different individuals or factions claiming to be the lawful governing body . . . BIA properly must look to the tribe's governing documents, and interpret their provisions, to determine who appears to be the lawful tribal governing body.[88]

As the Acting Regional Director warned the Nation in the Interim Decision, dueling 638 proposals presented one circumstance in which the BIA could deem it necessary to evaluate which of the two factions was the proper governing body.[89] In light of both the Halftown and Jacobs Council's submission of 2016 638 proposals, it was accordingly justified for the Regional Director to examine Cayuga law on the merits and determine which group properly represents the Nation.

ii. The Regional Director based his decision on Cayuga law.[90]

Appellants raise two primary objections to the Regional Director's determination that the Initiative was consistent with Cayuga law. Upon review, I find that Appellants' arguments miscast the nature and purpose of the Decision, and are not persuasive.

(1977) ("Inherent in the authority of a tribe to govern itself is its authority to determine the manner in which differences are resolved.") (citing *McCurdy v. Steele*, 506 F.2d 653 (10th Cir. 1974)).

[87] *Goodface v. Grassrope*, 708 F.2d 335, 338-39 (8th Cir. 1983).

[88] *William H. Richards, Sr. et al. v. Acting Pac. Reg'l Dir.*, 45 IBIA 187, 191-92 (2007) (citations omitted); *accord Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 145 n.22 (D.D.C. 2002) ("Plaintiff appears to concede that the BIA has a responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe and that the BIA should have read the Seminole Nation's constitution and sought a solution that conformed with tribal law.") (quotations and internal formatting omitted); *LaRocque*, 29 IBIA at 203 (noting that although "intra-tribal disputes should be resolved in tribal forums, [the IBIA] has also recognized that the government-to-government relationship between the Federal government and the tribes may require BIA to make a decision concerning tribal leadership, and that, in making such a decision, BIA has authority to interpret tribal governing documents").

[89] *See* 25 U.S.C. § 5321(a)(1) (requiring Department to enter into a 638 contract if requested by an Indian tribe or tribal organization); 25 U.S.C. § 5304(e), (*l*) (defining "Indian tribe" and "tribal organization"); *Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell*, 593 Fed. Appx. 606, 609 (9th Cir. 2014) (unpublished) (affirming BIA's rejection of a 638 contract proposal submitted by a group that was neither the Tribe's governing body nor approved by the Tribe's governing body). *See also* Decision at 2 (AR-Tabs 1-2 00003) (explaining ISDA requirements).

[90] Cayuga law, which is traditional and unwritten, is complex. As the Regional Director noted, "there is a true division between the Halftown Council and the Jacobs Council supporters regarding the requirements of Cayuga Nation law with respect to how Council members are chosen and under what circumstances they can be removed from the Nation Council," as well as "a dispute over the factual circumstances surrounding each of the members of the Halftown Council." Decision at 10 (AR-Tabs 1-2 00011). For the Parties interpretations of applicable tenets of Cayuga law, *see generally* Jacobs Memo and Letter Brief; *see also George*, 49 IBIA at 167-68.

First, Appellants argue that the Regional Director "declined to review Cayuga law on the central question of the validity of the statement of support campaign as a matter of law."[91] That is inaccurate. The Regional Director premised the Decision on a provision from the Haudenosaunee Great Law of Peace, the basis of traditional Cayuga law, which states that:

> Whenever a specially important matter or a great emergency is presented before the Confederate Council and the nature of the matter affects the entire body of the Five Nations, threatening their utter ruin, then the Lords of the Confederacy must submit the matter to the decision of their people and the decision of the people shall affect the decision of the Confederate Council. This decision shall be a confirmation of the voice of the people.[92]

The Regional Director found that this suggests that at the most basic level, governance among the Haudenosaunee tribes (including the Nation) "comports with the principle articulated in the United States Declaration of Independence: governments derive their just powers from the consent of the governed."[93] The Regional Director accordingly held that the Initiative, which demonstrated the Nation's citizens' opinion as to whom they consented to be their leadership, was consistent with this tenet of Cayuga law.

The Regional Director did note in the Decision that the passage above "specifically addresses matters presented to the Confederated Council of the Haudenosaunee Confederacy - not each constituent member of the Confederacy."[94] But the Regional Director reasoned that in light of the Great Law's guiding principle of invoking the will of the people, he could not "conclude that the citizens of each Haudenosaunee Nation have less authority with respect to their own Nation than they have within the overall Confederacy."[95] This, too, was reasonable, as the Regional Director had further received briefing that this specific passage was applicable to both the Confederate Council and to each member nation of the Council.[96]

Appellants argue forcefully that the Regional Director's reliance on this passage was misplaced,[97] and present their own interpretation of Cayuga law that they allege demonstrates the inherent impermissibility of the Initiative within the Nation's traditional, Clan-based framework.[98] But in the Decision, the Regional Director recognized the "true division" "between the Halftown Council and the Jacobs Council supporters regarding the requirements of Cayuga Nation law with respect to how Council members are chosen and under what circumstances they can be removed from the Nation Council," as well as "a dispute over the

---

[91] Appellants' Brief at 6 (quotations omitted); *see also id.* at 5, 7.
[92] Decision at 6 (AR-Tabs 1-2 00007) (quoting ARTHUR C. PARKER, THE CONSTITUTION OF THE FIVE NATIONS 55 (1916)). As the Regional Director noted, both parties cited the Parker transcript of the Great Law, *id.* at 6 n.15, and I will do so as well.
[93] *Id.* (internal quotations omitted).
[94] *Id.* (citing Jacobs Memo at 12-13 (AR-Tabs 1-2 00064-65).
[95] *Id.* at 7 (AR-Tabs 1-2 00008).
[96] Halftown Response Brief at 4-6 (AR-Tabs 1-2 00167-69); *accord* Brief of Interested Parties in the Cayuga Nation and the BIA Recognized Governing Body of the Nation at 6 (May 01, 2017) [hereinafter "IP Brief"].
[97] Appellant's Brief at 14, 14 n.6.
[98] *See generally id.* at 12-16.

factual circumstances surrounding each of the members of the Halftown Council."[99] In the "face of this division, [the Regional Director] determined that the results of the Statement of Support campaign should be respected"[100] after receiving and considering briefing from both Councils that set out their views of Cauyga law. I conclude that this determination was valid.

iii. The Regional Director did not "mandate" Cayuga government by plebiscite.

Appellants next argue that the Regional Director's statement in the Decision that "a plebiscite must be a valid mechanism by which a body politic may decide matters of governance"[101] amounts to a mandate that the Nation may only "use a plebiscite or any electoral mechanism to choose its governmental representatives."[102] Appellants cite several tribes that govern according to clan based law,[103] and argue that the Decision was:

> [T]hus premised on the following insupportable conclusions of law, reached independently of any inquiry into the law of the Cayuga Nation:
>
> - Non-electoral/non-plebiscite processes for choosing leaders deny Indian citizens their "right to have a say in their own government"
>
> - Non-elected tribal governments lack the consent of the governed
>
> - The only valid means for Cayuga citizens to "choose a government that reflects their choices" is through a plebiscite or electoral process[104]

Appellants conclude that the Regional Director infringed on tribal sovereignty by forcing the Cayuga Nation to govern via election, plebiscite, or some other mechanism of majority rule.[105]

I reject this argument for several reasons. First, contrary to Appellants' characterization,[106] the Decision does not "mandate" that the Nation govern exclusively via plebiscite. Rather, as noted above, the Regional Director found that under these specific circumstances, Cayuga law permits the use of a plebiscite in order to ascertain the peoples' understanding of their governmental structure and leaders. He wrote:

> Ultimately, all BIA can do is decide whether either of the entities that has submitted a proposal for a 638 Community Services contract has provided adequate evidence that they represent the Cayuga Nation. This decision

---

[99] Decision at 10 (AR-Tabs 1-2 00011).
[100] *Id.*
[101] Decision at 8 (AR-Tabs 1-2 00009).
[102] Appellants' Brief at 5.
[103] *Id.* at 7; Appellants' Reply at 2.
[104] Appellants' Brief at 7.
[105] *Id.*; *accord* Appellants' Reply at 1 (claiming that Decision establishes that "Indian tribes and nations 'must' accept plebiscites as a means of choosing leaders").
[106] *See, e.g.*, Appellants' Brief at 6 n.3 (framing the Decision as having examined "whether, as a matter of law, the Nation must use plebiscites").

> accepts the arguments put forward by the Halftown Council that the statement of support campaign has demonstrated the legitimacy of that Council. Further application of the statement of support campaign to determine future Cayuga Nation decisions will be in the hands of the Cayuga citizens and leaders. Going forward, the meaning of the statement of support campaign is a question of Cayuga Nation law.
>
> . . . .
>
> While recognizing the Halftown Council, I am certainly mindful that important tensions remain for the Cayuga to work through. The contentious relationships between the Halftown Council and the Clan Mothers is concerning given the historic interconnection of these two sources of leadership within the Cayuga Nation. In accepting the statement of support process as support for the Halftown Council, it was extremely important to me that the governing process document endorsed by the citizens gives the clan members a mechanism for relief if they are unhappy with their council members.[107]

This is consistent with the limited nature of the Initiative, which was designed to establish a baseline tribal government through which BIA could perpetuate its government-to-government relationship with the Nation.[108] The Regional Director made clear in the Decision that it is now the Nation's right, and responsibility, to determine how its governance will operate moving forward – whether via the Nation's traditional consensus process, through some form of election process, or however else.[109] Nothing in the Decision demands that the Nation hold annual Initiatives or permanently discard their traditional governance structure, or suggests that in less tumultuous circumstances, BIA would not decline a request to certify an Initiative (much like it did in 2015).

Second, while BIA may interpret tribal law in the limited circumstances discussed *supra*, Federal officials must still be cautious to defer to the tribe's interpretation of its own laws and its ability to internally resolve its disputes.[110] In that sense, the Regional Director correctly noted that via the Initiative, "a significant majority of the Cayuga citizens have stated their support for the Halftown Council. I cannot consider this outcome as anything other than resolution of a tribal

---

[107] Decision at 14 (AR-Tabs 1-2 00015).

[108] *See, e.g. Ransom v. Babbitt*, 69 F. Supp. 2d 141, 154 (D.D.C. 1999) ("This Court has held that when tribal governmental entities are 'irremediably unavailable,' a referendum is an appropriate way for the Tribe to reach decisions that have authority and legitimacy.") (quoting *Harjo v. Kleppe*, 420 F. Supp. 1110, 1146 (D.D.C. 1976)); *Tarbell v. E. Reg'l Dir.*, 50 IBIA 219, 234 (2009) (when "in a series of referenda, the tribal voters overwhelmingly denied the validity of the Constitution and expressed their desire to be governed by the Three Chiefs, not by the Constitution . . . the Regional Director was not free to ignore the expressed will of the Tribe's membership").

[109] *See, e.g.*, Decision at 10-11 (AR-Tabs 1-2 00011-12) (noting that the "governance process approved through the statement of support campaign does lay out a way by which Cayuga Nation leaders can be removed from office, so adopting these results should not freeze the Nation with its current configuration of leaders" and that the Initiative "it is hoped, allow[s] the Nation to proceed and adapt, as necessary, to the needs of the future").

[110] *Anna Thompson et. al. v. E. Area Dir.*, 17 IBIA 39, 50 (1989) (citing *Menominee Tribal Enters. v. Minneapolis Area Dir.*, 15 IBIA 263, 266 (1987) and related cases).

dispute by a tribal mechanism."[111] I equally consider myself obligated to recognize the result of that tribal process.[112]

Appellants' own actions underscore this point. In the Jacobs July Letter, Appellants raised the same issues they put forth on appeal before the Cayuga Nation citizenry, arguing that an Initiative would replace the Cayuga traditional government with "an Anglo-American style government" and "Chiefs and Clan Mothers with a system of 'majority voting.'"[113] Appellants further argued in favor of a consensus-based government, and urged citizens to respond to the Initiative by writing in that they rejected "this process of voting by mail" and instead "support the Cayuga Nation's traditional system of consensus decision making by the Chiefs and Clan Mothers."[114] Cayuga citizens were thus provided with two choices: (1) review the Statement of Support Materials and affirmatively support the Halftown Council's interpretation of Cayuga law and proposed composition of the Council; or (2) review Appellants' interpretation of Cayuga law and reject the Initiative. While it is true that, as Appellants argue, the Nation may not have previously selected leaders through a plebiscite, the BIA must respect the fact that 60% of eligible citizens nevertheless agreed that doing so was permissible under Cayuga law and sided with the Halftown Council.[115]

3. The Regional Director did not violate Appellants' due process rights.

Appellants next argue that the Regional Director violated Appellants' due process rights during the Initiative process. Specifically, they allege that (1) the Regional Director prejudged the dispute in favor of the Halftown Council; and (2) the Regional Director improperly colluded with the Halftown Council and excluded the Jacobs Council from meaningful participation in the Initiative.

For the reasons discussed below, I find that the Regional Director's actions during the course of the Initiative did not violate Appellants' rights of due process.

i. The Regional Director did not prejudge this dispute in favor of the Halftown Council.

---

[111] As the Regional Director noted, Appellants also challenge the right of several members of the Halftown Council to hold their seats at all, which Appellants argue undercuts the Initiative's baseline legitimacy. Decision at 10 (AR-Tabs 1-2 00011). But, the Regional Director held that the Initiative represented the consensus of the Cayuga citizens that the Halftown Council was the Nation's proper governing body, thus addressing this aspect of Appellants' arguments. *Id.*

[112] *Id.* at 14 (AR-Tabs 1-2 00015); *see also* IP Brief at 9 ("[T]he Statement of Support initiative was not a means of "choosing" leaders at all. Rather, in a manifestation of community consensus, citizens affirmed (a) their view of Cayuga Nation law; and (b) their view regarding the identity of the Nation's rightful leaders, in light of that law."); *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938 (D.C. Cir. 2012) ("The Echo Hawk letter acknowledges that the Timbisha Shoshone resolved their *own* leadership dispute through a valid *internal* tribal process. See Appellees' 28(j) Ltr. Attach. 1, at 3 ('The April 29 election — not my March 1 Order — constituted the resolution of an internal tribal dispute in a valid tribal forum.').") (emphasis in original).

[113] AR-Appendix A 00288.

[114] *Id.*

[115] While Appellants also challenge the Initiative as conducted, as discussed *infra*, I decline to overturn the Decision on procedural grounds.

Appellants first argue that the Regional Director violated Appellants' due process rights by "prejudging" the question of whether the Initiative was consistent with Cayuga law.[116] In support, Appellants note that four months prior to requesting formal briefing on this issue, the Regional Director stated in the June Letter "that a 'Statement of Support' process would be a viable way" for resolving the Nation's leadership dispute.[117] Appellants claim this demonstrates that they were "deprived of a neutral decision maker on the core issue of whether the campaign of support could be used to choose the Nation's leaders."[118]

It "requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair."[119] And without more, "even an appearance of impropriety does not support an inference of bias."[120] Accordingly, in "the absence of clear evidence to the contrary, courts should presume that public officers have discharged their official duties properly."[121] To overcome this presumption, Appellants must demonstrate that the Regional Director was "not capable of judging a particular controversy fairly on the basis of its own circumstances."[122] "This standard is met when the challenger demonstrates, for example, that the decision maker's mind is 'irrevocably closed' on a disputed issue."[123]

Appellants have made no such showing. Rather, the Regional Director's actions demonstrate a commitment to an impartial determination of the Initiative's necessity and legitimacy. For example, in the June Letter, the Regional Director stated that "under the current circumstances," the Initiative "would be *a* viable way of involving the Cayuga people in a determination of the form and membership of their tribal government"; that is, one potential option in light of the Nation's ongoing inability to resolve the dispute through other means.[124] The Regional Director further encouraged Appellants to propose "an alternative method for obtaining accurate information regarding the will of the Cayuga Nation's citizens," sought more information about Appellants' concerns with the Initiative, and urged Appellants to work with the Halftown Council to ensure that the Initiative best reflected the will of the Cayuga people.[125]

---

[116] Appellants' Brief at 8-9.

[117] *Id.* at 8 (citing June Letter at 1 (AR-Appendix A AR 00201)).

[118] *Id.* at 9.

[119] *South Dakota v. United States DOI*, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005) (quoting *United States ex rel. De Luca v. O'Rourke*, 213 F.2d 759, 765 (8th Cir. 1954)).

[120] *L.C. v. Utah State Bd. of Educ.*, 188 F. Supp. 2d 1330, 1338 (D. Utah 2002); *accord Heirs and Successors in Interest to Mose Daniels v. E. Okla. Reg'l Dir.*, 55 IBIA 139, 145 n.7 (2012) ("Even if there were some evidence in this case of bias or prejudice on the part of the Regional Director or Durham, which there is not, Appellants would still be required to make the substantial showing necessary to overcome the presumption that the Regional Director and Durham discharged their official duties properly, and to establish that their recusal was required.") (and collecting cases).

[121] *South Dakota*, 401 F. Supp. 2d at 1011 (quoting *Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 929 F. Supp. 1165, 1176 (W.D. Wis. 1996)).

[122] *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) (quotations and internal citation omitted)

[123] *Nec Corp. v. United States*, 151 F.3d 1361, 1373 (Fed. Cir. 1998) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948)).

[124] June Letter at 1 (AR 00201) (emphasis added).

[125] *Id.* In their Reply, Appellants criticize what they argue was an artificially short deadline that the Regional Director offered for Appellants to comment on the proposed Initiative, suggesting that such a deadline was unauthorized by law. Appellants' Reply at 3-4, 4 n.4. There is no evidence that the Regional Director considered

Throughout the implementation of the Initiative, the Regional Director continued to correspond with Appellants about their opposition to the Initiative.[126] Finally, in light of Appellants' objections to the Initiative, the Regional Director sought briefing from both Appellants and the Halftown Council about "the validity of the statement of support process as a matter of law, "any concerns about the process by which the statement of support was actually conducted," and "whether tribal traditions support the Jacobs council."[127]

None of these actions suggest that the Regional Director had a closed mind or impassible bias. For example, at no point did the Regional Director state that the Initiative was the sole option for dispute resolution or that it was definitively consistent with Cayuga law – he accepted it as a potential possibility, actively sought alternatives, and solicited and considered Appellants' dissenting views.[128] Nor did the Regional Director publicly disparage Appellants' position,[129] demonstrate overt hostility towards Appellants,[130] make public statements to the media favoring the Halftown Council's positions,[131] or have a pecuniary interest in supporting the Halftown Council.[132] Finally, there are no indicia of impropriety from the fact that the Regional Director did not request briefing on the Initiative until after having provided the Halftown Council with technical assistance.[133] Appellants' allegations of bias appear to be based on their disagreement with the Regional Director's decision on the merits, rather than evidence on the Record.[134]

Appellants assign outsized value to the Regional Director's statement in the June Letter that the Initiative "would be a viable way" of resolving the dispute, arguing that that statement demonstrates the Regional Director had already concluded that the Initiative was unquestionably legitimate under Cayuga law.[135] That is not the case: as discussed *inter alia*, the Regional Director explicitly sought alternatives from the Jacobs Council, consulted with them during the Initiative process, and proactively sought briefing on this very issue prior to validating the

---

that deadline to be anything other than a suggestion or that he did or would have rejected Appellants' request for an extension of time. And, the Regional Director continued to accept comments from Appellants for weeks after the deadline had passed. *See* June Letter at 1 (AR 00201) (asking for comments within ten days from June 17, 2016); First Heath Letter (AR-Appendix A 00203) (dated July 1, 2016); Second Heath Letter (AR-Appendix A 00286) (dated July 8, 2016).

[126] *See, e.g.*, First Heath Letter (AR-Appendix A 00203); Second Health Letter (AR-Appendix A 00286); Cayuga Nation Fact Sheet (Oct. 2016) (AR-Appendix A 00332).

[127] Scheduling Order at 2 (AR-Appendix B 00341).

[128] *See, e.g., McClure v. Ind. Sch. Dist. No. 16*, 228 F.3d 1205, 1215-16 (10th Cir. 2000) (establishing bias where decision makers "publicly stated their intent to terminate [ ] McClure's employment prior to the hearing at which the matter of her termination was to be decided").

[129] *See Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 589-90 (D.C. Cir. 1970) (finding prejudgment when decision maker gave speech critical of party whose matter was pending before agency).

[130] *See Guo-Le Huang v. Gonzales*, 453 F.3d 142 (2d Cir. 2006) (finding bias on part of immigration judge who verbally harassed and made derogatory cultural references towards asylum applicant).

[131] *See Rio Arriba, N.M., Bd. of County Comm'rs v. Acting Sw. Reg'l Dir.*, 38 IBIA 18, 28-29 (2002).

[132] *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

[133] *See Riggins v. Goodman*, 572 F.3d 1101, 1113-14 (10th Cir. 2009) ("[I]nvolvement of tribunal members in earlier proceedings in the same case does not overcome the presumption of honesty and integrity.") (quotation omitted).

[134] *See Haseltine v. Astrue*, 668 F. Supp. 2d 1232, 1234 (N.D. Cal. 2009) ("[P]laintiff has not made an adequate showing of bias. Instead, plaintiff merely disagrees with decisions of the ALJs below.").

[135] Appellants' Brief at 4 n.2; Appellants' Reply at 3-4, 3 n.3.

Initiative. The Record simply does not support Appellants' suggestion that these proceedings were a six-month sham designed to obfuscate the Regional Director's prejudged conclusion.

Rather than indicating predisposition towards the Halftown Council, the Regional Director's actions reflect a good faith effort to develop a factual record and fully understand both Councils' interpretation of Cayuga law prior to rendering a final decision.[136] Appellants have neither undermined the Regional Director's presumed impartiality nor "substantially shown" that the Regional Director prejudged this matter.

ii. The Regional Director did not collude with the Halftown Council.

Appellants next argue that the Regional Director violated Appellants' due process rights by colluding with the Halftown Council.[137] Appellants allege that the Regional Director engaged in improper ex parte meetings and other communications with the Halftown Council, excluded the Jacobs Council from any such discussions, and improperly provided the Halftown Council with technical assistance during the administration of the disputed Initiative.[138] However, this also does not "substantially show" that the Regional Director was impermissibly biased.

First, both the United States Supreme Court and the IBIA have held that that there is no prohibition on ex parte communications for the purposes of appeals governed by 25 C.F.R. Part 2.[139] Regardless, none of the Regional Director's supposedly collusive actions were improper: the Regional Director was communicating with and providing technical assistance towards ostensible Nation representatives who were working on a means through which to resolve a tribal leadership dispute. "It is well established that BIA's policies of tribal self-determination [and] Indian self-government . . . are policies established by Congress, and are reasonable and rationally designed to further Indian self-government and not violative of due process, and also do not constitute structural bias. . . ."[140] The Regional Director's assistance was similarly designed to further the Nation's self-governance as part of the Regional Director's routine duties,[141] and does not demonstrate illegal collusion with the Halftown Council.

---

[136] *See Estate of Dorothy Glende*, 61 IBIA 183, 183 (2015) ("What Appellant points to as instances of bias by the [judge] actually illustrate that the [judge] sought to fully develop the record, whether or not the evidence favored Appellant,. . .").

[137] Appellants' Brief at 9.

[138] *Id.* at 9-12.

[139] *See United States v. Navajo Nation*, 537 U.S. 488, 512-14 (2003) (because the parties had elected to proceed with an appeal before the Assistant Secretary pursuant to 25 C.F.R. Part 2, rather than before the IBIA pursuant to 43 C.F.R. Part 4, "the regulatory proscription on ex parte contacts applicable in Board proceedings thus did not govern"); *see also Mary Carol Jenkins, et al., v. W. Reg'l Dir.*, 42 IBIA 106, 110 n.8 (2006) ("Unlike appeals pending before the Board, see 43 C.F.R. § 4.27 (b), there is no express prohibition against ex parte communications during appeals pending before a Regional Director, although notice and opportunity-to-comment requirements may apply. See 25 C.F.R. § 2.21 (b)."). While the *Navajo* Court examined a version of 25 C.F.R. Part 2 that has since been amended, the amendments did not substantively alter the requirements at issue, nor did the Final Rule demonstrate any agency intent to do so. *See generally* Appeals From Administrative Actions, 54 Fed. Reg. 6,478 (Feb. 10, 1989).

[140] *Rodney R. Starkey et al. v. Pac. Reg'l Dir.*, 63 IBIA 254, 270 (2016) (citations and internal quotations omitted).

[141] *See, e.g., United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 (1994) (routine collaboration between agencies does not demonstrate collusion); *United States v. Lucas*, No. CR-14-0197 EMC, 2014 U.S. Dist. LEXIS 169708, at *12 (N.D. Cal. Dec. 8, 2014) (same); 25 C.F.R. § 23.42 (vesting Regional Director with responsibility of providing tribal technical assistance for certain grants).

Second, Appellants claim that the Regional Director deliberately excluded the Jacobs Council from any meetings, conversations, and technical assistance related to the Initiative.[142] But a "mere assertion of bias is inadequate to prove that bias was present in fact."[143] The fact that there may have been instances during the Initiative in which BIA staff met with or spoke only to the Halftown Council, without more, does not overcome the Regional Director's presumption of good faith – as Appellants admit,[144] there is no legal requirement that the BIA only meet with a tribal leadership faction if the other faction is present as well.[145] And Appellants fail to provide concrete examples of specific meetings, conversations, or other occurrences where the Regional Director deliberately excluded the Jacobs Council in order to benefit the Halftown Council.[146]

Third, Appellants point to a statement from the Halftown Council letter to Cayuga citizens in which the Halftown Council "predicted with confidence that the 'the Interior Department will respect and recognize the results of this process,' long before any of the legal and factual issues were briefed to the BIA."[147] While Appellants insinuate that the Regional Director had secretly assured the Halftown Council that he would authorize the Initiative, an aspirational statement sent in a political mailer does not overcome the Regional Director's presumed good faith.

Finally, the Record belies Appellants' claims. The Regional Director invited Appellants to help craft the mechanics of the Initiative, sought Appellants' input on alternatives that Appellants believed would be in closer fidelity to Cayuga law, and, prior to actually accepting the result of the Initiative, accepted full briefing on the issues Appellants raised in the First Heath Letter. The fact that Appellants at times chose not to engage in the Initiative process, or now disagree with the Regional Director's ultimate decision, does not render his conduct impermissible. I find that the Regional Director did not improperly collude with the Halftown Council in violation of Appellants' due process rights.

---

[142] *See generally* Appellants' Brief at 9-12; First Heath Letter at 2, 4, 6, 38-39 (AR 00204, 00206, 00208, 00240-41); Notice of Appeal at 2, 3, 12 (AR 01473-74, 01483).

[143] *Fort McDermitt Paiute Shoshone Tribe v. Acting Phoenix Area Dir.*, 27 IBIA 84, 84-85 (1994). *See also Sheikh Mohammed Bey v. Bogan*, No. 93-2483, 1994 U.S. App. LEXIS 10153, at *6 (6th Cir. May 4, 1994) ("His principal allegations, that the various government agencies conspired and colluded to deny him his due process rights, are unsupported, conclusory statements, which this court has held are insufficient to sustain the burden of establishing a due process violation. . . .").

[144] Appellants' Brief at 11 ("Due Process does not entirely prohibit the BIA from meeting with the Halftown group without the participation of the traditional leaders.").

[145] *See, e.g., Space Age Eng'g, Inc. v. United States*, 4 Cl. Ct. 739, 744 (Cl. Ct. 1984) ("Inferences cannot be substituted for the clear and convincing proof required [do demonstrate agency bad faith]. One must present well neigh-irrefragable proof to overcome the presumption that government employees have acted conscientiously in the performance of their duties.").

[146] Appellants claim that their representatives were not present when the BIA examined the Initiative results in September 2016. Appellants' Brief at 11; Jacobs Memo at 22-23. Even assuming that this was true, it does not inherently demonstrate the Regional Director's bias.

[147] Appellants' Brief at 10 (citing Letter from Cayuga Nation to Cayuga Citizens at 1 (July 6, 2016) (AR-Appendix A 00274)).

4. The Regional Director's decision was not arbitrary, capricious, or unsupported by substantial evidence.

Appellants next allege that the Decision was arbitrary and capricious because (1) the Regional Director reversed a "longstanding BIA position" without explanation; (2) the Regional Director relied on an invalid estimate of Cayuga citizenship when tallying the vote percentages; (3) the Regional Director disregarded unrebutted expert testimony that the Initiative was procedurally defective; (4) the Regional Director ignored evidence that the Halftown Council provided Nation citizens with cash payments in exchange for votes; and (5) the Initiative was inconsistent with federal regulations governing Secretarial elections at 25 C.F.R. Part 81.[148] As discussed below, I do not find Appellants' arguments persuasive.

i. The Regional Director did not arbitrarily reverse a longstanding agency position.

In the Interim Decision, the Acting Regional Director declined a request to resolve the leadership dispute via a Statement of Support Process.[149] She held that BIA was not aware of any "applicable authority that provides for verification of election results or allows BIA to provide any independent confirmation of results of a 'Campaign of Support' *under these circumstances*."[150] The Acting Regional Director also noted disagreement among the various Cayuga factions as to whether Cayuga law authorized such a process, an issue which was "purely a matter of Nation law and policy upon which it would not be appropriate for BIA to intrude."[151] Appellants argue that the Regional Director did not explain his subsequent acceptance of the Initiative and departure from the Interim Decision, and that the Decision was accordingly both arbitrary and contrary to evidence.[152]

At the outset, it was not inherently impermissible for the Regional Director to reevaluate a previous BIA decision.[153] As the Supreme Court has observed, "'[r]egulatory agencies do not establish rules of conduct to last forever,' . . . and . . . an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'"[154] So, while an agency must show that there are good reasons for the new policy, it need not demonstrate that the reasons for the new policy are better than the reasons for the old one; rather, it suffices that the new policy is permissible under the law.[155] In such cases, the agency need only proffer a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy.[156]

---

[148] *Id.* at 16-24.
[149] Interim Decision at 8 (AR-Appendix B 00341 h).
[150] *Id.* (emphasis added).
[151] *Id.*
[152] Appellants' Brief at 16-17.
[153] *See, e.g., Joette D. Willis v. Nw. Reg'l Dir.*, 45 IBIA 152, 162 (2007) ("BIA's decision . . . must be made based on the facts and circumstances known to BIA at the time of BIA's decision. We do not think that BIA can ignore a change of circumstances. . . .").
[154] *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (quoting *Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe R.R. Co.*, 387 U.S. 397, 416 (1967) *and In re Permian Basin Area Rate Cases*, 390 U.S., 747, 784 (1968)) (alteration in original).
[155] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515-16 (2009).
[156] *Id.*

The Regional Director's decision to authorize a Statement of Support campaign satisfies this standard. While Appellants categorize the Interim Decision as reflective of "longstanding BIA policy," the Acting Regional Director made clear that she was rejecting the Statement of Support process because there was no need, at that time and under those circumstances, to determine whether Cayuga law authorizes such a process.[157] Instead, she emphasized that because BIA could engage with the previously-recognized 2006 Council on an interim basis, the "Region believes that current circumstances do not warrant a decision on the merits of Nation law regarding who should be recognized."[158] But, the Acting Regional Director also specified that "this is not to say that those circumstances may not arise at a future time, conceivably when the time comes for the Nation to renew an ISDA contract," and urged the Nation to use the interim recognition to "resolve this dispute using tribal mechanisms and prevent the need for the BIA to examine Nation law and make a subsequent determination based on the results of that examination."[159]

This is precisely what the Regional Director did with regard to the Initiative. In the June Letter, the Regional Director noted that BIA supported the Initiative based on "the current circumstances":[160] namely, nearly two years of worsening disputes after the Interim Decision.[161] In the Decision itself, the Regional Director explained the changed circumstances that required a reevaluation of the Interim Decision's rejection of the Statement of Support process. First, the Regional Director noted that unlike the Acting Regional Director in 2015, he could not simply "enter into a contract with the Nation 2006 Council, which did not submit a proposal."[162] Second, "one year and ten months" had passed since the issuance of the Interim Decision without any internal resolution of the leadership dispute, thus necessitating that the Regional Director "look at the processes the Cayuga Nation has undertaken to resolve this dispute, including the Statement of Support Campaign."[163] The Decision also considered and rebutted Appellants' current arguments about agency reversal[164] and identified numerous other pressing issues requiring a final Cayuga leadership determination.[165]

This was not an abrupt reversal of a settled agency determination without explanation.[166] Rather, the Interim Decision was strongly qualified and explicitly suggested that if the parties failed to come to a consensus, an ISDA renewal could warrant a change in agency position. The Regional Director agreed that the BIA needed to reevaluate its previous decision in light of

---

[157] Interim Decision at 8 (AR-Appendix B 00341 h).
[158] *Id.* at 7 (AR-Appendix B 00341 g).
[159] *Id.*; *see also Cayuga*, 58 IBIA at 185 (noting that a new 638 proposal could "serve as justification for a future decision" concerning accurate tribal leadership).
[160] June Letter at 1 (AR-Appendix A 00201).
[161] *See, e.g.*, Initiative Request at 3-4 (AR-Appendix A 00187-88).
[162] Decision at 3 (AR-Tabs 1-2 00004).
[163] *Id.*
[164] *Id.* at 13-14 (AR-Tabs 1-2 00014-15).
[165] *Id.* at 3-4 (AR-Tabs 1-2 00004-05).
[166] *See, e.g., Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Nw. Reg'l Dir.*, 35 IBIA 226, 238 (2000) (improper agency reversal "where (1) there was no doubt as to BIA's initial interpretation of the statutory provision at issue; (2) BIA had acted upon that interpretation, and (3) BIA had explicitly changed its interpretation"), *aff'd, Confederated Salish and Kootenai Tribes v. Norton*, Case No. CV 01-018-M-DWM (D. Mont. Mar. 29, 2002), *aff'd*, No. 02-35491 (9th Cir. Sept. 15, 2003).

changed circumstances. He did so via a formal opinion letter after offering Appellants full participation in the Initiative process and an opportunity to voice their concerns through formal legal briefing. This constitutes a "reasoned explanation" for the Regional Director's decision to accept the Initiative, was not arbitrary and capricious, and was made after consideration of the full Record in this case.

ii. The Regional Director reasonably relied on the citizenship roll used in the Initiative.

Appellants next argue that it was arbitrary and capricious for the Regional Director to have certified the Initiative results in light of competing estimates of Cayuga citizenship. Appellants identify (1) a statement from the Halftown Council's 638 application that the Nation provides services to "650+ citizens";[167] a United States Census Table stating that there are 947 individuals who self-identify as Cayuga;[168] a statement from the Jacobs Council's 638 application stating that the Nation's government office serves "approximately 500 Cayuga Nation citizens";[169] and (4) the Nation's citizenship roll used in the Initiative, which lists a total Nation membership of 525 citizens and 392 voting-age adults.[170] Appellants note that because the Regional Director found that 237 adult Cayuga citizens submitted statement of support in favor of the Initiative, this would constitute a majority only if there are fewer than 475 voting-age Cayuga citizens.[171] Appellants accordingly fault the Regional Director for relying on the Nation's membership role alone in certifying the Initiative given that the remaining citizenship estimates all exceed 500 people.

Appellants' concerns are not without merit. It is true that there are multiple estimates of Cayuga citizenship, and that in light of the Halftown Council's fairly narrow margin of victory, even a slight difference in membership could change the results of the election. I also find it troubling that, as the Regional Director noted, the Jacobs Council credibly alleged that they were denied permission to independently review and cross-verify the membership roll used for the purposes of the Initiative, which was created by and remained in the custody of the Halftown Council.[172]

Nevertheless, considering the totality of the circumstances, I find the Regional Director's reliance on the Cayuga membership roll to be reasonable. Both Appellants and Interested Parties have previously proffered Cayuga membership estimates that contradict their current arguments, and which they both now attempt to explain away. Appellants claim that their reference to serving 500 citizens only meant citizens who receive direct services from the tribal headquarters in the Nation's Seneca Falls office, and that that statistic does not reflect the total amount of

---

[167] Appellants' Brief at 18 (citing Cayuga Nation: Submission of Three-Year 638 Program Proposal for 206-2018 (AR-Appendix A 0308)).
[168] *Id.*; *see also* 2010 Census CPH-T-6. American Indian and Alaska Native Tribes in the United States and Puerto Rico: 2010; Tbl. 1: American Indian and Alaska Native Population by Tribe1 for the United States: 2010 (Dec. 2013), *available at* https://www.census.gov/population/www/cen2010/cph-t/t-6tables/TABLE%20(1).pdf.
[169] Appellants' Brief at 18-19 (citing Cayuga Nation Consolidated Tribal Government Program Proposal at 2 (AR-Appendix A 00337).
[170] *Id.* (citing Decision at 9 (AR-Tabs 1-2 00010)).
[171] *Id.* at 19.
[172] Decision at 8 (AR-Tabs 1-2 00009)).

Cayuga citizens nationwide who might have been eligible to vote in the Initiative.[173] Interested Parties claim that their statement that there are "650+" Cayuga citizens was merely outdated boilerplate language used in the Nation's 638 applications.[174] The parties' insistence that I disregard their own estimates submitted as part of formal applications for federal services underscores the reasonableness of the Regional Director's decision to do the same. The Regional Director was similarly reasonable in rejecting the U.S. census estimate, which he noted was based on self-identification and thus did not account for whether those individuals were actually enrolled members of the Nation.[175] The membership roll instead appears to be the best available evidence before the Regional Director.[176]

This is true even if Appellants were unable to independently verify the roll's accuracy. The Regional Director found that BIA performed adequate due diligence here:

> From September 7 - 9, staff from the BIA's Eastern Regional Office visited the Halftown Council's offices to conduct an initial review of the statements of support sent in by the Nation's citizens. On September 21, 2016, representatives of the Halftown Council visited the BIA's Eastern Regional Office in Nashville, Tennessee. Bureau employees scrutinized the statements of support, and the membership roll maintained by the Nation's Secretary. The BIA concluded that, of 392 adult Cayuga citizens identified on the membership roll, 237 submitted statements of support for each of the two propositions. (Additional statements of support were submitted, but were rejected for various reasons.).[177]

In light of the scrutiny with which the BIA reviewed the Cayuga membership roll as it related to the statement of support, I cannot conclude that the Regional Director's reliance on the roll was arbitrary and capricious as a matter of law.[178]

---

[173] Appellants' Brief at 18-19.
[174] IP Brief at 20.
[175] Decision at 9 (AR-Tabs 1-2 00010).
[176] *See, e.g., Miranda v. Jewell*, No. EDCV 14-00312-VAP(DTBx), 2015 U.S. Dist. LEXIS 5716, at *20-21 (C.D. Cal. Jan. 15, 2015) ("The Bureau's deference [to tribal membership list] accords with the general jurisdictional rule that allocates to tribes near-absolute primacy to make membership determinations.").
[177] Decision at 5 (AR-Tabs 1-2 00006) (citations omitted).
[178] In briefing before the Regional Director, Appellants raised additional arguments concerning the membership roll. First, they provided an affidavit from the Bear Clan Mother alleging that she and others never received Statement of Support Campaign materials, extrapolating that this could be due to the membership list being incomplete. Jacobs Memo at 19-20 (AR-Tabs 1-2 00071-72). The Regional Director reasonably found that the lack of specificity in the total numbers of alleged missing Statements and in the affidavit generally could not justify rejecting the Initiative in its entirety. Decision at 9 (AR-Tabs 1-2 00010). Appellants also argued that the membership roll could contain non-Cayuga citizens. Jacobs Memo at 20 (AR-Tabs 1-2 00071); Jacobs Response Brief at 9-10 (AR-Tabs 1-2 00151-52). Appellants provide no evidence to support these statements, and in any event do not raise them on appeal.

iii. The Regional Director did not improperly ignore Appellants' expert testimony.

In the proceedings below, Appellants submitted an Expert Report as an exhibit to their Response Brief that sought to discredit the Initiative.[179] Appellants argue that the Regional Director erred by "disregard[ing] each of the multiple deficiencies identified by the two experts in voting and public opinion polling, [and] repeatedly refusing to accept the relevance of academic research on bias and other flaws."[180]

I disagree. Appellants frame their argument as if the Regional Director ignored the Expert Report altogether.[181] But the Regional Director devoted several pages in the Decision to explaining why he did not believe that the experts' concerns undermined the Initiative as a whole.[182] For example, the Regional Director:

- Acknowledged that certain language in the Statement of Support was biased towards the Halftown Council, but found that there was no evidence that this would have confused or otherwise misled Cayuga voters given their small numbers, network of communal knowledge, and deep familiarity with the dispute between the Jacobs and Halftown Councils.[183]

- Explained how the experts' reliance on analysis of traditional public opinion surveys was not entirely relevant in light of the contextually and factually distinct Initiative.[184]

---

[179] *See generally* Jacobs Response Brief; *see also id.* Ex. A, Analysis of the 2016 "Statement of Support Campaign" (AR-Tabs 1-2 00157). For the purposes of this appeal, because the Regional Director accepted the expert status of the Report's authors, Decision at 11 (AR-Tabs 1-2 00012), and because no parties to this appeal have challenged that determination, I will similarly assume that the experts are qualified under applicable law.

[180] Appellants' Brief at 23. In their Reply, Interested Parties argue that I should disregard the Expert Report because it was attached to the Appellants' Response Brief, citing an IBIA case setting out the rule that officials "ordinarily will not consider arguments raised for the first time in a reply brief." IP Brief at 24 (quoting *Yakama Nation* v. *Nw. Reg'l Dir.*, 51 IBIA 175, 180 (2010)). However, I find that the expert report properly addressed the claim that the Halftown Council raised in its own briefing before the Regional Director, namely that the Initiative demonstrates "the support of an overwhelming number of [the Cayuga] people" for a new government led by and "definitively demonstrates that the Jacobs council is an entity that was not properly constituted under Cayuga law or traditional processes." Halftown Letter Brief at 13, 18; *see also* Jacobs Response at 5 (AR-Tabs 1-2 00147). As such, the Response Brief and the Expert Report did not improperly raise arguments for the first time. However, to the extent that Appellants seem to insinuate that the Expert Report is due particular deference because it is unrebutted, *see* Appellants' Brief at 23, I agree with Interested Parties that the Report's inclusion in a reply brief meant that the opposing parties did not have an opportunity to respond directly. IP Brief at 24. I therefore decline to afford independent weight to the Report in light of its unrebutted status. *See also, e.g.*, *Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 798 (6th Cir. 1996) (jury may reject testimony even if formally uncontradicted).

[181] Appellants' Brief at 23-24.

[182] Decision at 11-13 (AR-Tabs 1-2 00012-14).

[183] *Id.* at 12-13 (AR-Tabs 1-2 00013-14).

[184] *Id.* at 11 (AR-Tabs 1-2 00012).

- Pointed out that at least some of the factual premises upon which the experts relied were disputed at best and incorrect at worst.[185]

- Noted that even the experts admitted that some of their conclusions were speculative.[186]

Far from ignoring or casually rejecting the Expert Report, the Regional Director considered the experts findings and did not find them dispositive. The Decision was not arbitrary and capricious merely because Appellants believe their experts were correct.

iv. The Regional Director reasonably rejected Appellants' allegations of vote purchasing.

Appellants argue that the Regional Director found in favor of the Halftown Council despite evidence that the Halftown Council had paid Cayuga citizens for their votes.[187] Appellants cite to an Exhibit from the Halftown Response Brief "attesting that 92% of Cayuga citizens received and cashed checks from the Halftown group within the three weeks prior to distribution of campaign of support materials," and allege that "at least some citizens received cash payments at the same time as campaign of support materials."[188] Appellants accordingly claim that the Regional Director arbitrarily and capriciously upheld the Initiative despite the potentially corrupting influence of these "vote payments."[189]

I do not find this argument persuasive. The Controller of the Cayuga Nation testified that distribution checks are mailed quarterly, on the fifteenth day of March, June, September, and December.[190] Nothing in the Record suggests that the June 2016 distribution deviated from this schedule in form or in function, or that the timing of the Initiative process bore any relation to the timing of the June distribution.[191] The Regional Director further noted that Appellants' allegation that one named individual and unnamed "other" individuals received their distribution check and Statement of Support materials at the same time[192] is not, without more, evidence of vote purchasing – for example, mail may have accumulated over the course of several days, and there is no indication that this phenomenon was widespread in any way.[193] The Record demonstrates that 92 percent of Nation citizens had cashed or deposited their distribution check by June 30, 2016, with an additional 3 percent having done so in the first week of July 2016,

---

[185] *Id.* at 12 (AR-Tabs 1-2 00013).
[186] *Id.*
[187] Appellants' Brief at 21-23.
[188] *Id.* at 21-22 (citing Decision at 12 (AR-Tabs 1-2 00013) and Halftown Response Brief, Ex. C. (AR-Tab 1-2 00181)).
[189] *Id.* at 23.
[190] Halftown Response Brief, Ex. C. (AR-Tab 1-2 00181).
[191] As Appellees point out, because the response time for the Initiative spanned several months, it would have been difficult for Cayuga citizens to have not received both a quarterly distribution and the Statement of Support documents in some proximity to one another. Appellee Brief at 15; *see also* IP Brief at 23 n.15 (noting that "with regularly-spaced quarterly distributions, any given distribution will never fall more than six weeks (half of three months) before any mailing, such as the initiative here").
[192] Jacobs Memo, Ex. G at 2 (AR-Tab 1-2 00129).
[193] Decision at 12 (AR-Tabs 1-2 00013).

while the Statement of Support Materials were not mailed until July 6, 2016.[194] The vast majority of Cayuga citizens therefore had already deposited their distributions prior to the Initiative going public, and it is speculation at best to assume that voters would have felt beholden to support the Initiative simply because they had recently received a pre-planned distribution.

Appellants offer testimony that certain members of the Turtle Clan did not receive the June 2016 distribution checks at all,[195] and claim that the Halftown Council threatened to withhold checks from their political opponents.[196] But Appellants do not provide additional evidence of their claim of missing June distributions, establish that any such checks were deliberately withheld as a means of political retribution, demonstrate that checks went missing exclusively or primarily among the Jacobs Council and their supporters, etc.[197] Moreover, the document Appellants cite in support of their claim that the Halftown Council threatened their opponents is a June 2014 letter in which Clint Halftown, Tim Twoguns, and Gary Wheeler announced that payment of the June 2014 quarterly distribution would be withheld from individuals who had allegedly damaged Cayuga property.[198] That letter is several years old, is not tied to the 2016 distribution or the Initiative, and in any event does not demonstrate that the Halftown Council is currently targeting the Jacobs Council through the distribution process. Nor does it support Appellants' allegations that the Regional Director condoned vote buying during the Initiative. It was thus not arbitrary and capricious for the Regional Director to have rejected Appellants' allegations of financial impropriety in connection to the Initiative.[199]

v. Federal regulations governing Secretarial elections are inapposite here.

Appellants next claim that the Decision was arbitrary and capricious because, as the Regional Director noted, the Initiative did not incorporate certain procedural safeguards set out in 25 C.F.R. Part 81 (Part 81).[200] Appellants accordingly argue that the Decision should be vacated because it lacks "any reasoned explanation for approving a process that departs so radically from federally mandated procedures."[201]

Part 81 "prescribes the Department [of the Interior]'s procedures for authorizing and conducting elections when Federal statute or the terms of a tribal governing document require the

---

[194] *Id.*; *see also* Halftown Response Brief, Ex. C. (AR-Tab 1-2 00181).
[195] Jacobs Memo, Ex. G at 2 (AR-Tab 1-2 00129).
[196] *Id.* at Ex. I (AR-tab 1-2 00138-39).
[197] *See, e.g.*, *Hope for Families & Cmty. Serv. v. Warren*, 721 F. Supp. 2d 1079, 1117 (M.D. Ala. 2010) (rejecting allegation of vote purchasing in the "absence of an evidentiary link connecting the monetary payment to an illegal purpose"); *Dansereau v. Ulmer*, 903 P.2d 555, 561 (Alaska 1995) (party alleged vote buying scheme "must demonstrate that the Borough paid voters and did so with an intent to induce voters to vote for or refrain from voting for a particular candidate").
[198] Jacobs Memo, Ex. I (AR-tab 1-2 00138-39).
[199] In addition, as the Regional Director noted in the Decision, Appellants' experts conclusion that "distribution checks 'may have been perceived' to have been linked to the survey completion is very general, and does not fatally undermine . . . the statement of support campaign results as prima facie evidence of the will of the Cayuga citizens who returned the documents." Decision at 12 (AR-Tab 1-2 00013).
[200] Appellants' Brief at 19-21; Decision at 8, 13 (AR-Tab 1-2 00009, 00013).
[201] Appellants' Brief at 21.

Secretary to conduct and approve an election to: (a) Adopt, amend, or revoke tribal governing documents; or (b) Adopt or amend charters."[202] Here, neither federal law nor Cayuga law requires a Secretarial election, and thus Part 81 does not apply. The Regional Director's failure to hold the Initiative to an inapplicable set of standards was not arbitrary and capricious.[203]

IV. Conclusion.

Based on the foregoing analysis, I conclude that the Regional Director's acceptance of the Initiative was not arbitrary and capricious, was supported by substantial evidence, and did not violate Appellants' due process rights. I therefore affirm the Regional Director's decision to award the 638 Community Services contract to the Halftown Council and return as unauthorized the contract proposed by Appellants. This decision is final in accordance with 25 C.F.R. § 2.20(c) and no further administrative review is necessary.

JUL 13 2017

Michael S. Black
Acting Assistant Secretary – Indian Affairs

[202] 25 C.F.R. § 81.1.

[203] It is true that the Regional Director stated his disapproval for certain aspects of the manner in which the Initiative was conducted, and compared them negatively to the higher standards set out in Part 81. Decision at 8, 13 (AR-Tab 1-2 00009, 00013). But as a matter of law, that does not apply Part 81 to the Initiative. And, the Regional Director detailed why he found the Initiative to be valid even notwithstanding these procedural shortcomings. *See generally id.* And Appellants point to no case law suggesting that a tribal election must mirror a Part 81 election.

CERTIFICATE OF SERVICE

I certify that on the 14th day of July, 2017, I delivered a true copy of the foregoing Order to each of the persons named below by depositing an appropriately-addressed copy in the United States mail, or by hand-delivery.

Via United States Mail

Alexandra C. Page, Esq.
Berkey Williams LLP
616 Whittier Street, NW
Washington, DC 20012

William Jacobs
Cayuga Nation Council
P.O. Box 169
Seneca Falls, NY 13148

Clint Halftown
Cayuga Nation Council
P.O. Box 803
Seneca Falls, NY 13148

David DeBruin
Jenner & Block
1099 New York Avenue, NW
Suite 900
Washington, DC 20001-4412

Charlie Galbraith
Kilpatrick Townsend & Stockton LLP
607 14th Street, NW
Suite 900
Washington, DC 20005-2018

Daniel J. French
Barclay Damon LLP
Barclay Damon Tower
125 East Jefferson Street
Syracuse, NY 13202

Eric F. Facer
Law Offices of Eric F. Facer, PLLC
1025 Connecticut Avenue, Suite 1000
Washington, DC 20036

Niels Holch
Holch & Erickson LLP
400 North Capitol Street, NW
Suite 585
Washington DC, 20001

Bruce Loudermilk, Director
Bureau of Indian Affairs
MS-4606-MIB
1849 C Street, NW
Washington, DC 20240

Bruce Maytubby, Eastern Regional Director
Bureau of Indian Affairs
545 Marriott Drive, Suite 799
Nashville, TN 37214

Leta Hollon
Office of the Knoxville Field Solicitor
800 S. Gay Street, Suite 800
Knoxville, TN 37929

Miles Janssen, Counselor to the
Assistant Secretary—Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
MS-3642-MIB
Washington, DC 20240
Office: (202) 208-7352
Miles.Janssen@bia.gov